STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM STEVENS,

Defendant-Appellant.

SUPREME COURT NO. 149380

COURT OF APPEALS NO. 309481

CIRCUIT COURT NO. 10-005622-FC

JERARD M. JARZYNKA (P35496)
Prosecuting Attorney
JERROLD SCHROTENBOER (P33223)
Chief Appellate Attorney
312 S. Jackson Street
Jackson, MI 49201-2220
(517) 788-4283

ADAM STEVENS #832548
Defendant-Appellant in Pro Per
Saginaw Correctional Facility
9625 Pierce Rd.
Freeland, MI 48623

149380

ANSWER TO APPLICATION FOR LEAVE TO APPEAL

The People of the State of Michigan asks this Court to deny this application for leave to appeal and answers defendant as follows:

1-3. Plaintiff admits in part and denies in part. On February 9, 2012, a jury found defendant guilty of second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3). Jackson County Circuit Court Judge John McBain then denied a motion for a new trial on March 20, 2012.

4. Plaintiff admits. On March 22, 2012, Judge McBain sentenced defendant to 25 to 50 years concurrent to 2 years, 4 months, to 4 years.

5. Plaintiff admits. On April 10, 2013, the Court of Appeals affirmed in an unpublished opinion .

6. Plaintiff admits. This application is timely.

7A. Plaintiff neither admits nor denies but asks this Court to deny this application for leave to appeal. The first issue, judicial bias, lacks merit.

Despite what defendant says, he objected to only one of the two instances that he is now complaining about. The only preserved instance did not show bias simply because the judge asked the same questions of the prosecutor's expert witness. As it is, this judge not only asked almost every witness questions during trial, but ended up telling the jury that his questions were not trying to influence the vote or to express a personal opinion. (February 8, 2012, Trial Transcript [Tr VII], p 80). Defendant is not entitled to a new trial.

The trial court asked questions of almost all the witnesses in this case. (January 31, 2012, Trial Transcript [Tr II], pp 69, 73, 91, 100, 112, 158, 160; February 1, 2012, Trial Transcript [Tr III], pp 36, 46-47, 71-72, 103, 129, 139, 158-159, 160, 170; February 2, 2012, Trial Transcript [Tr IV], p 76; February 6, 2012, Trial Transcript [Tr V], pp 39, 51, 59, 90, 123, 138, 146, 158, 162; February 7, 2012, Trial Transcript [Tr VI], pp 14-16, 17-18, 26-27, 48, 42, 61, 70, 80, 110, 112, 118-119, 121, 127). Out of all of these questions, defendant complains about only two lines of questioning. Of those two, the only preserved one deals with questioning Dr. Mark Schuman. He complains mostly about the judge asking how far Dr. Schuman had to travel and whether or not his

traveling this far is unusual.[1] These questions do not show bias simply because the judge later asked the prosecution's main witnesses the same questions. Dr. Jeffrey Jentzen testified that, although he has not been court appointed, he has flown across the country to testify. (Tr VI, pp 113, 118-119). In addition, both Doctors Schuman and Jentzen testified that they have previously testified for both the prosecution and the defense. (Tr VI, pp 20, 114).[2]

In this two-week trial, where the judge asked questions from almost every witness, defendant did not object to the only questions that went over the line. He did not object to the judge using the word "allegedly." Instead, he just tried to clarify what had actually been testified to previously. (Tr V, pp 158-159). At no time during the trial did defendant either complain about the judge using the word "allegedly" or that his examining him showed bias. As pointed out in *United States v Warshak,* 631 F3d 266, 305 (CA 6, 2010), defendant's failure to object "cuts in favor of a finding that the remarks were not particularly prejudicial, as anything significantly deleterious would presumably prompt a swift objection from experienced defense counsel."

As it is, the trial court's questioning was legitimate. Defendant, a professed "neat freak" (Tr V, p 181), said that he had fallen on a toy and had thus dropped his baby. (Tr V, p 55). As it was, none of the other children were present and the three-month-old was not old enough to play with the truck. (Tr VI, p 164). In

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[1]Dr. Schuman testified that, except for traveling to California, the farthest that he has traveled from Miami is Vermont. (Tr VI, pp 17, 20).

[2]To the extent that defendant says that the trial court's demeanor denigrated the defense witness, this Court may ask for the trial's audio/video. This Court can make its own judgment.

addition, the truck was not there when the police arrived. The judge was delving into what may have happened to it in the meantime.

Therefore, the Court of Appeals correctly affirmed:

> While the trial court could have been more careful in its choice of words, the trial court did not unjustifiably arouse suspicion with its inquires of the defense witnesses and thus we find no error. The testimony elicited may have been harmful to defendant's case but it was not improper. [Citation omitted.] The trial court merely questioned Dr. Schuman about his experience as a medical examiner and the type of methodologies he uses in preparing reports. Those lines of questioning were relevant. MRE 401; 403. In all but one of the instances the defendant made no objection to the trial court's questions. This failure to object cuts in favor that the remarks were not particularly prejudicial. (P 5).

The Court of Appeals then went on to point out that the trial court instructed the jury not to conclude that its questions were to influence the jury. (Tr VII, p 80). The Court of Appeals concluded:

> "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." [Citation omitted.] In this case, the trial court's jury instructions that its comments, questions, and rulings were not evidence that should be considered by the jury were appropriate and, again, we find no error. (P 5).

No need exists to grant leave from this unpublished case.

7B. Plaintiff neither admits nor denies but asks this Court to deny this application for leave to appeal. Defendant's second issue, evidence sufficiency also lacks merit.

The child's injuries are more extensive than can be accounted from what defendant describes. The three-month-old child had cracked ribs from two weeks

earlier. The subdural hemorrhaging that the child received can almost never come from a short fall. The prosecution's experts concluded that the child died from abusive head trauma. The amount of force needed for these injuries fits second-degree murder. Defendant is not entitled to have Count I vacated.

In reviewing a sufficiency claim, this Court must look at the evidence in the light most favorable to the jury's verdict and affirm if any rational fact finder could find guilt beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 516; 489 NW2d 748 (1992). As pointed out in *People v Nowack,* 462 Mich 292, 400; 614 NW2d 78 (2000), "[a] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury." As further pointed out in *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999), "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." The prosecution is not required to negate every reasonable theory consistent with innocence. *Nowack,* 462 Mich 400. Because proving an actor's state of mind is difficult, "minimal circumstantial evidence is sufficient." *People v Fetterly,* 229 Mich App 511; 583 NW2d 199, 203 (1998), lv den 459 Mich 866; 584 NW2d 735 (1999). In the end, defendant has "a nearly insurmountable burden." *Davis v Lafler,* 658 F3d 525, 534 (CA 6, 2011), cert den ___ US ___; 142 S Ct 1927; 182 L Ed 2d 788 (2012).

Second-degree murder requires that plaintiff prove (1) a death, (2) caused by defendant's act, (3) with malice, and (4) without justification or excuse. In this situation, malice requires the intent to take an action whose natural tendency is to

cause death or great bodily harm, wantonly and willfully disregarding that risk. *People v Portellos,* 298 Mich App 431, 443; 827 NW2d 725 (2012). Defendant does not even challenge anything but the malice requirement. Yet, just because he did not intend to kill does not mean that he did not have malice. *Id.*

In the past, defendant has not always been the best person to be around. Although he disputed having physically abused his girlfriend, Crystal Anderson, as much as she testified to, he admitted that he was controlling and had done some things. (Tr V, p 107). At one point, he had punched a hole in the wall while she was pregnant. (Tr V, pp 109-110). He also once took her telephone from her and snapped it in half. (Tr V, pp 114-115). To top it off, he was verbally abusive to Anderson's oldest child. (Tr V, p 97).

Then, just the day before the child died, Anderson told defendant again that she wanted to break up. (Tr V, p 106). He acknowledged that he was upset. (Tr V, p 106). Later that evening, his son died. Two weeks earlier, someone had squeezed the child so hard as to break a number of ribs. (Tr III, pp 94, 102-103). The child also had subdural hemorrhaging. The child died from an injury to the brain which swelled. (Tr V, p 141). The injury occurred soon before death. (Tr V, p 141). On the other hand, death from a short fall is about one in a million. (Tr V, p 112). These injuries could not have come from the child being upside down or against the shoulder. (Tr V, pp 107-108). They did not come from a mere flip. (Tr I, p 108). The injuries are also inconsistent with a short fall. (Tr V, p 110). They did not come from a trip and fall. (Tr I, p 110). In other words, someone had to have used blunt force against the child to cause these injuries.

To top it off, defendant is an acknowledged liar. He admitted that he lied to the police when he told them that he had not accidentally dropped the child. (Tr V, pp 88-89). In fact, even though he had spoken to Anderson a few times in the meantime, he failed to mention to her the fall until two weeks after the event. (Tr V, p 98). For example, two days after the event, he told Anderson that all that he had done was pick up the child. (Tr V, p 135). In the meantime, defendant had spent time in jail, a jail including Ronald Woodard, who was then charged with felony murder for beating an infant to death. *People v Woodard*, 493 Mich 919; 823 NW2d 599 (2012). Woodard was claiming that the infant had died through a short fall. All of a sudden, defendant claimed that his child too had died through a short fall, an accident that he had not bothered telling anyone about earlier.

In the end, the evidence is legally sufficient. Plaintiff established the malice necessary for second-degree murder. He is not entitled to have Count I vacated.

Therefore, the Court of Appeals correctly rejected this claim too:

> Testimony established that on several prior occasions Anderson had told defendant he was being too rough with Kian and had taken Kian away from defendant. Anderson testified that she actually had asked defendant whether he had heard of shaken baby syndrome and defendant admitted to Detective Boulter that he had been a little rough with Kian at first. In addition, the force required to inflict the brain injuries on Kian would have been substantial. Moreover, Dr. Jensen testified that the injuries Kian ultimately died from had been inflicted a short time prior to the time he stopped breathing and the only people with Kian during that time were Anderson and defendant. Both defendant and Anderson testified that defendant was in the livingroom alone with Kian before Anderson awoke and Anderson testified that when she first saw defendant, he was holding Kian upside down. The evidence was sufficient, as a whole, for a reasonable jury to conclude that

> defendant intended "to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." (P 6).

No need exists to grant leave to appeal from this unpublished case on this issue either.

7C. Plaintiff neither admits nor denies but asks this Court to deny this application for leave to appeal. Defendant's third issue, the trial court's response to a jury question, also lacks merit.

The judge's supplemental instruction was correct. Both MRE 404(b) and MCL 768.27b allow a jury to consider other acts in deciding whether or not defendant committed the charged offense. Defendant's claim that the jury would convict based on the other acts alone is nothing but speculation. The trial court specifically told the jury that the charged crimes come from August 19, 2010:

> The prosecutor must also prove beyond a reasonable doubt that the crimes occurred on or about August 19th, 2010 within the county of Jackson in the state of Michigan. (Tr VII, p 83).

Then, directly after telling the jury that it could consider the past abuse only "for certain purposes," (Tr VII, p 106) the judge said:

> You may only think about whether the evidence tends to show that the defendant acted purposefully, that is, not by accident or mistake, or because he misjudged the situation. You must not consider this evidence for any other purpose. (Tr VII, p 106).

Defendant does not even try to explain how this instruction says anything other than what the law says. He is not entitled to a new trial on Count II.

Hence, the Court of Appeals correctly rejected this claim too:

> The jury's question, as acknowledged by defense counsel, did not clearly indicate for what purpose it questioned the

> consideration of the past acts of child abuse. Rather than reminding the jury of the specific acts that were alleged, the trial court crafted an instruction advising it that it could consider any evidence that was allowed at trial, including the past instances of abuse. The trial court was careful, however, to remind the jury that the past instances of abuse, *i.e.* those that occurred prior to August 19th, were [to be considered only] for very limited purposes. The trial court specifically re-advised the jury, "[y]ou have heard evidence that was introduced to show that the defendant was involved in other alleged facts and/or conduct *for which he is not on trial* . . ." then reiterated that this evidence was to be considered only for very limited purposes. Thus, the trial court did not, as alleged by defendant, amend the information, or change the theory of child abuse. The trial court was very careful in instructing the jury that while any evidence may be considered for the child abuse charge, defendant was not on trial for the other acts evidence. The instruction sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried. . . . (Pp 7-8).

Once again, no need exists to grant leave to appeal from this unpublished opinion.

7D. Plaintiff neither admits nor denies but asks this Court to deny this application for leave to appeal. Defendant's fourth issue, Dr. Bethany Mohr's testimony, also lacks merit.

Defendant incorrectly claims that this evidence was admitted under MRE 803(4). Instead, it was admitted under MRE 702 and 703. Doctor Bethany Mohr gave the basis for her concluding that Kian had died from abusive head trauma.

The mistake that occurred, defendant having injured Kaylee not having been presented as evidence, does not require a new trial. This Court will reverse only if defendant has established a miscarriage of justice under a "more-probable-than-not" standard. *People v Lukity,* 460 Mich 484, 496; 596 NW2d 607 (1999). Doctor Mohr mentioning defendant having hurt Kaylee happened only once in this two-week trial.

The other evidence against defendant, including the autopsy pictures and Drs. Mohr's and Jentzen's opinions on why Kian died, are vastly more important. Besides, plaintiff could have remedied this matter by calling Kaylee as a witness who would have testified to that effect. Doing so would not only have eliminated any error but have accentuated the point to the jury. As it was, defendant acknowledged that he had at least verbally abused Kaylee. (Tr V, p 97). In the end, any error here is harmless.[3]

Therefore, the Court of Appeals correctly rejected this claim also by finding that defendant has not met his burden in showing "more probable than not":

> Anderson testified that defendant threatened to hit Kaylee and that she had to stand between them on one occasion to prevent him from hitting her. Evidence also was presented that defendant wrote a letter to Anderson apologizing for the way he treated Kaylee and defendant testified that he was verbally abusive to Kaylee. Moreover, during the one mention of the report, it also was elicited that Anderson stated that defendant had accidentally hurt Kaylee's arm and, on cross-examination, defense counsel elicited Dr. Mohr's acknowledgment that defendant said that the CPS report was unfounded and the investigation was closed shortly after it started. Finally, the minimum mention of the report was minor when considered against the remaining evidence presented against defendant concerning his treatment of Kian and Anderson. Had the evidence been excluded, then, it is not more probable than not that the outcome would have been different. (P 9).

Once again, no need exists to grant leave to appeal.

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[3]Defendant also incorrectly states that this issue is not preserved for appeal. Instead, his objection at the time was precisely what he is complaining about now, hearsay evidence. (Tr III, p 22). Therefore, the proper review standard is "abuse of discretion," not "plain error." *People v Bahoda,* 448 Mich 261; 531 NW2d 659 (1995).

7E. Plaintiff neither admits nor denies but asks this Court to deny this application for leave to appeal. Defendant's fifth issue, prior bad acts evidence, also lacks merit.

For two reasons, defendant is not entitled to a new trial on this issue either. First, the trial court did not abuse its discretion in allowing in the evidence. Second, any error was harmless.

First, the trial court did not abuse its discretion in allowing in the evidence. MCL 768.27b specifically allows for other domestic violence acts when the defendant "is accused of an offense involving domestic violence." Defendant was accused of murdering his own son. Defendant does not even claim that this offense does not involve domestic violence.

Instead, defendant says nothing more than the unfair prejudice outweighed the probative effect. Although the probative effect is not particularly high (other than to show propensity, something that MCL 768.27b specifically allows), it is not particularly prejudicial either. Plaintiff's experts testified that the victim died through abusive head trauma. (Tr III, pp 43, 46, 128, 141). The now-complained-about previous instances are mild, merely giving the jury background as to who defendant is. Specifically, the trial court allowed in (1) the child suffering a bruise to the forehead while defendant babysat him alone, (2) defendant having been rough with the child, (3) defendant having tossed the child, (4) defendant having once left the victim alone, (5) defendant's verbal abuse to Kaylee, (6) defendant being very controlling with the children and Anderson, (7) defendant punching a hole in the wall, (8) defendant smashing Anderson's cell phone, (9) defendant throwing a glass object against the wall,

(10) defendant threatening to slit Anderson's throat, (11) defendant telling Anderson not to tell anyone, (12) defendant assaulting Anderson while she was pregnant, and (13) defendant having physically hurt Kaylee. (November 29, 2011, PreTrial hearing [PT Tr], pp 11-16).[4] These items are nothing compared to the damage done to Kian the night that he died. In looking at this type of evidence, "this Court looks at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v Cunningham,* 679 F3d 355, 383 (CA 6, 2012). Specifically, a judge has very broad discretion in weighing undue prejudice. *United States v Fisher,* 648 F3d 442, 449 (CA 6, 2011). Given that this evidence is not so very unfairly prejudicial (does not substantially outweigh the probative value), the trial court did not abuse its discretion in allowing in these instances.

Second, for essentially the same reason, any error was harmless. These items are just not that prejudicial. They are nothing compared to what actually occurred on August 21. Absent this evidence, defendant cannot show that the jury more likely than not would have acquitted.

Thus, the Court of Appeals correctly rejected this claim as well. It first noted that MCL 768.27b applies. (P 10). It then found the evidence properly admitted:

> The evidence concerning Kaylee was relevant because it tended to show that defendant had a propensity toward violence with children in the household. It also tended to refute his claim that any injury to Kian was accidental. The evidence concerning repeated acts of domestic violence against Anderson likewise was relevant to show that he may

[4]As it was, the trial court kept out three items: (1) defendant throwing out the children's meals for spilled milk, (2) defendant throwing Anderson's car keys, and (3) defendant throwing out a DVD. (PT Tr, pp 13, 15-16).

> have committed an assault against Kian that caused his death. The defendant's tendency to commit domestic assault in the past is highly probative to whether he has committed another domestic assault. . . . Having a "complete picture of a defendant's history" can help a jury determine how likely it is that a given crime was committed [citation omitted] as well as being "highly relevant to show [a] defendant's tendency to assault" again [citation omitted].
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> * * *
>
> Defendant has not demonstrated that he was unfairly prejudiced by the evidence. Defendant has merely stated that the evidence was unfairly prejudicial without providing any supporting authority or explaining how the evidence injected considerations extraneous to the merits of the law suit. While the evidence was damaging, as is most evidence presented against a criminal defendant, we do not find that it interfered with the jury's ability to rationally weigh the evidence concerning Kian's death. Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence, thereby limiting a potential for unfair prejudice. (P 11).

Once again, no need exists to grant leave to appeal from this unpublished decision.

7F. Plaintiff neither admits nor denies, but asks this Court to deny this application for leave to appeal. Defendant's sixth issue, guidelines scoring, also lacks merit.

First, OV 7 was properly scored a "50." Defendant battered his three-month-old son so much that he died from the injury to the brain. (Tr III, p 141). He used such force that a lot of subdural hemorrhaging occurred. OV 7 is properly scored a "50" if the victim is treated with excessive brutality. By itself, defendant being convicted of second-degree murder shows that this three-month-old child was treated with excessive brutality. Although he had been warned to treat the child better, defendant used such force that the brain bled enough to kill the child.

In any event, as the Court of Appeals pointed out, even taking away these 50 points does not change the guideline sentencing range. (P 14). No need exists to grant leave to appeal on this issue.

Second as the Court of Appeals correctly pointed out, defendant's present challenge to OV 10 has been waived. *People v Loper*, 299 Mich App 451, 472; 830 NW2d 836 (2013). At sentencing, other than on OV 7 and OV 13, defendant said that he had no objections to the guideline scoring. (Sentence Transcript, pp 22-23).

In any event, the sentencing court did not abuse its discretion. By itself, the difference in age alone is sufficient to uphold scoring OV 10. *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006). In any event, defendant is also the child's father. He took out his frustrations on his child. Anderson had just told him that she was leaving him. The child, of course, was vulnerable. Even if OV 10 is properly before this Court, defendant is not entitled to a resentencing.

Thus, the Court of Appeals also correctly rejected this claim (even assuming it is somehow properly preserved):

> Defendant's theory was that he accidentally dropped Kian, but did not immediately tell anyone or seek medical attention for Kian. Instead, defendant tried to act as though he had no idea what had happened and attempted to get Anderson to tell the police that she and defendant checked on Kian at the same time so that it would appear that he was never alone with Kian . . . to manipulate the situation to avoid detection of his abusive behavior and to allow defendant to avoid responsibility. (P 13).

Once again, no need exists to grant leave to appeal.

Third, OV 13 was also properly scored. OV 13 is properly scored a "25" if the "offense was part of a pattern of felonious criminal activity involving 3 or more

against a person." At the very least, the present two convictions constitute one such crime. In addition, not only did the child suffer cracked ribs previously, but he had had bruises on him earlier. Given that defendant committed the present offense, his having committed the previous offenses is not a stretch.

Therefore, the Court of Appeals correctly rejected this claim as well:

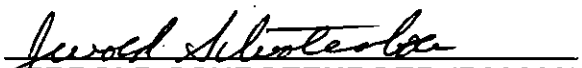
> Defendant was convicted of second- degree murder and second-degree child abuse; thus, there need [be only] one other crime committed within a five year period by defendant . . . for OV 13 to be scored at 25 points. Anderson testified at trial that she saw defendant shake Kian many times where Kian's head would flop and his neck would be strained. Anderson testified that defendant would be "playing" with Kian in this manner, but that she would take Kian away and yell at defendant about hurting him. Anderson also testified that prior to Kian gasping for breath, she saw defendant holding him upside down and then flipping him up without supporting his head or neck. There also was testimony that Kian had healing rib fractures at the time of his death. While there was not direct testimony that defendant caused the rib fractures, Anderson's testimony concerning the rough manner in which defendant handled Kian is circumstantial evidence that he committed other instances of child abuse. Finally, there is no dispute that Kian had a large bruise on his forehead that he received when in the care of defendant. While defendant's explanation was that he bumped Kian's head on the baby swing, the testimony from other witnesses was that the swing was an open top and it would thus have been difficult to bump his head. This, coupled with Anderson's testimony that the bruise appeared on the day that she attempted to break up with defendant which caused him to become very angry, is circumstantial evidence that defendant abused Kian that day. (Pp 13-14).

No need exists to grant leave to appeal on this issue either.

ACCORDINGLY, plaintiff asks this Court to deny leave to appeal from this unpublished opinion.

Respectfully Submitted,

June 17, 2014



JERROLD SCHROTENBOER (P33223)
CHIEF APPELLATE ATTORNEY